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Supreme Court, U.S.
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No. 10-1201

IN THE

Supreme Court of the United States

MARICOPA COUNTY SHERIFF'S DEPARTMENT, *et al.*,
Petitioners,

v.

CHARLES EDWARD BYRD,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the search performed on Mr. Byrd violate his Fourth Amendment right to be free from unreasonable searches under the facts of this case which involved a non-emergency, cross-gender, videotaped partial strip search performed by a female non-officer in civilian clothing?

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INTRODUCTION

Petitioners seek this Court's review of a fact-intensive Fourth Amendment question with no circuit split. Their petition identifies no conflict between the decision below and this Court's precedent. And their argument consists of little more than a complaint that the court of appeals misapplied the correct rule of law. Put simply, this case lacks any of the attributes that warrant discretionary review by this Court, and the petition should therefore be denied.

At issue here is the court of appeals' conclusion that the Fourth Amendment was violated by the specific and unusual facts and circumstances of the search in this case – a tactile search of a male inmate's groin and buttocks that, despite the availability of several male correction officers and the absence of an emergency, was carried out by a female cadet in civilian's clothing who moved the inmate's penis and scrotum twice and touched his anus through his thin, pink underwear, the only garment the inmate was wearing during the search. Petitioners concede that the court below identified the correct analysis to these facts – specifically, the multi-factor test for the reasonableness of a search articulated in this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). Indeed, the majority opinion and the dissent below consist of nothing more than dueling applications of the same analysis to a common set of facts. That alone makes this case unsuited for this Court's review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

What petitioners call a conflict among the circuits is simply a natural and unremarkable divergence in results arising out of the application of the fact-intensive *Bell* analysis to a wide range of facts and circumstances. There is no "rule" to be clarified in this case, no bright line to be drawn, no jurisprudential gap to be filled. Rather, there is an uncontroversial, well-established analysis applied to a search (i) with a uniquely intimate and intrusive scope, (ii) conducted in a particularly discomforting and offensive manner, (iii) lacking specific justification for the manner and scope, (iv) in a place where Fourth Amendment rights, while diminished, nevertheless warrant protection. That these different facts led the court below to reach a result different from some decisions (and similar to others) by different courts in different cases is unsurprising and does not render this case certiorari-worthy.

Because the "compelling reasons" that traditionally warrant this Court's review are absent here, the petition for certiorari should be denied.

STATEMENT OF THE CASE

Charles E. Byrd ("Mr. Byrd" or "Respondent") provides the following additional factual and procedural background due to misstatements and omissions of fact and law in the Petition for a Writ of Certiorari ("Petition").

THE SEARCH AT ISSUE

The search of Mr. Byrd occurred on October 28, 2004 in Durango Jail, a minimum security jail (not a prison) in Maricopa County, Arizona. At the time of the search, Mr. Byrd was a pretrial detainee (not a

prison inmate).[1] Officers entered Mr. Byrd's cell with taser and pepper guns drawn, demanding that he and the other detainees strip down to their pink underwear.[2] *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1136 (9th Cir. 2011) (en banc); Pet. App. 2a; App. A-2-A-3. The underwear had an open slit and no buttons near the genitalia area. App. A-3 & A-14. The officers ordered Mr. Byrd to walk from the housing area into the multipurpose room – a large open common area in the Durango Jail – wearing nothing but his pink underwear. *Byrd*, 629 F.3d at 1136; Pet. App. 2a; App. A-3, A-12, & A-21-A-22.

The multipurpose room was populated with individuals unfamiliar to Mr. Byrd, who were clad in civilian clothing, wearing blue jeans and white t-shirts. *Byrd*, 629 F.3d at 1136; Pet. App. 2a; App. A-3 & A-13. The civilian-clad individuals did not wear name badges or any other items indicating they were affiliated with the jail system. *Byrd*, 629 F.3d at 1136; Pet. App. 2a; App. A-13-A-14. None of these civilian-clad individuals were actual jail officers, but rather, as Mr. Byrd later learned, they were cadets in training. App. A-6. Approximately 10-15 uniformed detention officers also were present in the multipur-

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[1] Mr. Byrd was charged with and pled guilty to the non-violent act of identity theft relating to his unauthorized use of his brother's drivers license. App. A-1-A-2. He later was transferred from Durango Jail to the Arizona State Prison Complex, Alhambra Complex Baker Unit. Mr. Byrd had no history of violence and no disciplinary problems or "write-ups" while in jail or prison. App. A-6-A-7. He was released from the Arizona Prison Complex in November 2010.

[2] Maricopa County Sheriff's Office (MCSO) mandated that all male detainees wear pink underwear.

pose room. *Byrd*, 629 F.3d at 1136; Pet. App. 3a; App. A-12.

After entering the room, Mr. Byrd lined up as ordered. The taser and pepper guns remained pointed at Mr. Byrd from a close distance, and the officers holding these guns repeatedly yelled that he (and the four to six other detainees brought into the room with Byrd) better "[s]hut the fuck up" and not move or speak. *Byrd*, 629 F.3d at 1136; Pet. App. 2a; App. A-2-A-4. At no time prior to or during the search did anyone explain to Mr. Byrd or to the other detainees who the civilian-clad individuals were, what they were doing there, or that they were in any way affiliated with the Maricopa County jail system. App. A-4-A-5.

Cadet O'Connell ("O'Connell") – a female and non-officer dressed in civilian clothing – was selected to perform the partial strip search of Mr. Byrd. *Byrd*, 629 F.3d at 1137; Pet. App. 3a; App. A-4-A-5.[3] Mr. Byrd was still nearly nude and only wearing thin underwear with an open slit in the genital area when O'Connell conducted the partial strip search. App. A-14.[4]

Due to the invasiveness of this partial strip search of Mr. Byrd, O'Connell wore white latex gloves. *Byrd*, 629 F.3d at 1137; Pet. App. 3a; App. A-4 & A-

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[3] Petitioners claimed that "[t]he record contains no evidence that the jail has enough male officers to safely have only male officers conduct these pat searches of male inmates." Pet. 3-4. Yet, the record indicated that numerous male officers were in the room witnessing the search and available to conduct the search. App. A-12 & A-22.

[4] Despite Mr. Byrd's near nudity, petitioners claimed that "[O'Connell] did not view Mr. Byrd's skin after all clothing had been removed." Pet. 3.

20. All of the contact O'Connell made with Mr. Byrd's genital region was through his boxer shorts. But O'Connell still wore latex gloves given she admitted that the underwear fabric was a "very thin material." App. A-18-A-19.

O'Connell positioned herself behind Mr. Byrd and pulled the waistband of Mr. Byrd's underwear out 3-4 inches from Mr. Byrd's waist. App. A-5-A-6 & A-15-A-17. She then ran her hands up his inner thigh until she made contact with the point where Mr. Byrd's thigh met his groin area. *Byrd*, 629 F.3d at 1137; Pet. App. 4a; App. A-10-A-11 & A-17-A-18. She then used her hand to lift Mr. Byrd's testicles and moved them to the side, at which point she felt the skin underneath the testicles and ran her hand along Mr. Byrd's perineum (i.e., the patch of skin connecting the scrotum and anus). *Byrd*, 629 F.3d at 1137; Pet. App. 4a; App. A-10-A-11 & A-18-A-19. She next inserted her hand in between Mr. Byrd's buttocks' cheeks to separate them, and ran her hand upward along the crack. *Byrd*, 629 F.3d at 1137; Pet. App. 4a; App. A-19. Mr. Byrd testified that the search took approximately 60 seconds. *Byrd*, 629 F.3d at 1137; Pet. App. 4a; App. A-9. O'Connell testified that it took 10 to 20 seconds. *Byrd*, 629 F.3d at 1137; Pet. App. 4a; App. A-20.

Mr. Byrd testified that two people with handheld video cameras were present during the strip search of him and the other detainees. App. A-8-A-9. An excerpt of the footage from that day (which did not include Mr. Byrd) was edited into the "Video Yearbook" distributed to the cadets upon completion of O'Connell's Academy training. *Byrd*, 629 F.3d at

1147 & n.10; Pet. App. 24a; App. A-22-A-23.[5] The search of Mr. Byrd yielded no contraband. App. A-6-A-7. Indeed, there is no evidence in the record that any contraband was uncovered by any of the searches that day.

MARICOPA COUNTY SHERIFF'S OFFICE SEARCH POLICIES

Petitioners cited that the Maricopa County Sheriff's Office (MCSO) policy on searches, Policy DH-3, defines a "Frisk (Body) Search" as "carefully examining an inmate by inspecting his clothing, and feeling the contours of his clothed body." Pet. 2. Petitioners, however, omitted that the MCSO definition of a "Frisk (Body) Search" only describes that "[t]he inmate's shoes and socks may be removed during this process." Pet. App. 81a. The policy does not define a search as a "frisk search" when any other type of clothing (i.e. pants, shirts, bras, panties, or underwear) of jail detainees are removed.

Petitioners also claimed that "[i]nmates are searched over their boxers 'a couple of times a week.'" Pet. 3. But petitioners appeared to misconstrue fully-clothed, pat-down searches that are performed "several times daily" on each and every detainee with *en masse* underwear searches conducted by cadets in civilian clothing. Mr. Byrd is only challenging the constitutionality of the later and not the former. The *en masse* partial strip searches are not performed "several times daily" or even "a couple of times a week." The Executive Officer of the Durango Jail,

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[5] Mr. Byrd testified that the search by O'Connell was additionally humiliating and offensive because Mr. Byrd was sexually assaulted by women when he was a boy. App. A-7-A-8.

Lieutenant Scott Frye, swore under penalty of perjury that searches like the one at issue are performed "about four times a month" (i.e. once a week). App. A-27.

DISTRICT COURT DECISION

Mr. Byrd exhausted his administrative remedies in jail by filing four grievances related to his partial strip search by a cadet in civilian clothing. *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1137 (9th Cir. 2011) (en banc); Pet. App. 4a; App. A-28-A-30. On November 26, 2004, Mr. Byrd filed a *pro se* complaint in the United States District Court for the District of Arizona. *Byrd*, 629 F.3d at 1137; Pet. App. 4a. On a motion for a directed verdict, the district court issued a decision that dramatically narrowed Mr. Byrd's Fourth Amendment claim and "completely eliminated the jury's contemplation of whether the cross-gender strip search violated Byrd's right under the *Fourth Amendment* to be free from unreasonable search." *Byrd*, 629 F.3d at 1138; Pet. App. 6a. The district court then presented two discrete factual issues to the jury regarding the aspects of the Fourth Amendment claim that survived the directed verdict ruling: whether O'Connell conducted the search for an "identified security need" and whether O'Connell "intentionally squeez[ed] or knead[ed] Byrd's penis or scrotum." *Byrd*, 629 F.3d at 1138; Pet. App. 5a-6a & 78a-80a; App A-24-A-25. The jury made findings favorable to the petitioners on these issues, and judgment was entered against Mr. Byrd on his Fourth Amendment claim. App. A-26. Mr. Byrd timely appealed the district court's directed verdict.

THE PANEL DECISION

In a decision issued on May 18, 2009, a three-judge panel upheld the constitutionality of the search of Mr. Byrd over the dissent of the Honorable Ferdinand F. Fernandez. Acknowledging that "the question whether the district court erred ... [was] close," the majority observed:

> We are troubled by the overall circumstances of the search in question. The scope of the search was invasive in that it involved contact with Byrd's genital region, albeit through his boxer shorts. The embarrassment inherent in such a pat down and partial strip search was amplified by several factors: the cross-gender aspect; the fact that it took place in the presence of many officers and cadets, one third of whom were female; and that it took place in the presence of a person with a hand-held camera, notwithstanding the fact that the record does not give rise to the inference that Byrd's search was recorded.

Byrd v. Maricopa Cnty. Sheriff's Dep't, 565 F.3d 1205, 1224 (9th Cir. 2009), *rev'd en banc*, 629 F.3d 1135 (9th Cir. 2011); Pet. App. 74a.

Judge Fernandez further noted in his dissent that the Ninth Circuit has "never held that any cross-gender strip search is proper" even though it has allowed "pat down[s] of fully clothed male prisoners by female guards." *Byrd*, 565 F.3d at 1225 (emphasis added); Pet. App. 76a. "[T]his case presents no facts to suggest that there was an emergency or some other unique reason for authorizing the [cross-gender strip] search," he wrote, and "there were plenty of

men available, who could have conducted the search." *Byrd*, 565 F.3d at 1225; Pet. App 76a-77a.

On June 12, 2009, the court of appeals requested the parties to file simultaneous briefs on whether the case should be heard en banc. On October 6, 2009, the court of appeals ordered rehearing en banc.

EN BANC DECISION

On January 5, 2011, the court reversed the three-judge panel, concluding that the search of Mr. Byrd was a violation of his Fourth Amendment rights "[b]ecause the strip search was unreasonable under the facts of this case." *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1136 (9th Cir. 2011) (en banc) (emphasis added); Pet. App. 1a-2a. Applying the four-factor balancing test from *Bell v. Wolfish*, 441 U.S. 520 (1979), the court of appeals en banc carefully analyzed (i) the scope of the intrusion, (ii) the manner in which the search was conducted, (iii) the justification for conducting the search, and (iv) the place of the search. *Byrd*, 629 F.3d at 1142-43; Pet. App. 14a-17a. The court noted "that no emergency existed" for the cross-gender partial strip search, that "none of the detention officers participated in the searches," that "[a]t least one person videotaped the cadets' search of the inmates," that "[u]sing the back of her hand, O'Connell moved Byrd's penis and scrotum out of the way applying slight pressure to search the area," and that "O'Connell placed her hand at the bottom of Byrd's buttocks and ran her hand up to separate the cheeks while applying slight pressure." *Byrd*, 629 F.3d at 1136-1137. Pet. App. 2a-4a. Based on these facts, the court held that "[a]lthough the last two [*Bell*] factors weigh in favor of a determination of reasonableness,

the effect of the first two factors is so extreme that a conclusion of unreasonableness is compelled." *Byrd*, 629 F.3d at 1143; Pet. App. 17a.

The court found support for its decision in several circuits' decisions. *See, e.g., Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991); *Moore v. Carwell*, 168 F.3d 234 (5th Cir. 1999); *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994); *Hayes v. Marriott*, 70 F.3d 1144 (10th Cir. 1995). The court stated that a "litany of cases over the last thirty years has a recurring theme: cross-gender strip searches in the absence of an emergency violate an inmate's right under the Fourth Amendment to be free from unreasonable searches." *Byrd*, 629 F.3d at 1146; Pet. App. 23a; *see also supra* 10.

The court distinguished the circumstances of this case from the cases relied on by petitioners, observing that "[t]he scope of the intrusion in this case far exceeds searches we have previously sanctioned and weighs in favor of a finding of unreasonableness." *Byrd*, 629 F.3d at 1142 (citing *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988)); Pet. App. 14a.[6] It noted that "[c]ourts throughout the country have universally frowned upon cross-gender strip searches

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[6] The court's en banc majority characterized the *Byrd* search as a strip search as opposed to a pat down based on its previous decisions. For example, in *Grummett*, the Ninth Circuit defined pat-down searches as searches "done briefly and while the inmates are fully clothed, and thus do not involve intimate contact with the inmates' bodies." 779 F.2d at 496 (emphasis added), *cited in Byrd*, 629 F.3d at 1142, 1143 n.8; Pet. App. 12a & 15a.

in the absence of an emergency or exigent circumstances." *Byrd*, 629 F.3d at 1143; Pet. App. 17a.

The dissent acknowledged that finding "a female officer's probing search of a male detainee, wearing only thin boxer shorts" as reasonable was "unsavory to our sensibilities." *Byrd*, 629 F.3d at 1151; Pet. App. 32a. The dissenting judges conceded that neither of the decisions relied upon by the petitioners (i.e. *Grummett* and *Michenfelder*) were controlling and that these decisions did not "cover[] the current situation – a female officer's pat-down of a partially-clothed male inmate." *Byrd*, 629 F.3d at 1151; Pet. App. 33a. However, applying the same *Bell* analysis, the dissent reached the contrary conclusion that the facts and circumstances favored a finding of reasonableness. *Byrd*, 629 F.3d at 1148; Pet. App. 26a.

REASONS FOR DENYING THE PETITION

The petition fails to establish any "compelling" reason that satisfies this Court's exacting requirements for certiorari. Sup. Ct. R. 10. In short, the decision below conflicts neither with this Court's precedent nor any other circuit court decision, presents no important question that demands this Court's attention, and breaks no new ground. Instead, the court of appeals' decision reflects a straightforward application of a Fourth Amendment analysis established by this Court more than three decades ago. Accordingly, this case falls far short of the certiorari threshold.

Petitioners' claim of an inter-circuit conflict cannot withstand scrutiny. The claim rests on the

facile assertion that several courts of appeals have upheld different searches under different circumstances. This assertion ignores the principle at the heart of the analysis that petitioners concede applies here: that the reasonableness of a search under the Fourth Amendment turns on the unique facts of each search. This Court acknowledged that principle when it articulated that analysis in *Bell v. Wolfish*:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

441 U.S. 520, 559 (1979). Such a fact-specific inquiry is bound to yield different results under different circumstances. As petitioners concede, and the majority and dissenting opinions illustrate, that is precisely what has happened in the context of prisoner search jurisprudence.

In several cases, courts of appeals have indicated that bodily searches were unreasonable under the Fourth Amendment. *Moore v. Carwell*, 168 F.3d 234, 235 (5th Cir. 1999) (inmate stated a valid Fourth Amendment claim when the inmate filed a civil rights action alleging "multiple strip and body cavity searches performed by a female officer"); *Hayes v. Marriott*, 70 F.3d 1144, 1148 & n.5 (10th Cir. 1995) (reversing grant of summary judgment in favor of prison officials in case alleging that a video-taped

strip search conducted in the presence of, inter alia, female corrections officers violated his constitutional rights under the Fourth Amendment); *Canedy v. Boardman*, 16 F.3d 183, 187 (7th Cir. 1994) (reversing dismissal of case in which prisoner alleged he was subjected to cross-gender strip searches without an effort to accommodate his privacy interests; "[a]lmost every federal court that has addressed this issue has come to the conclusion that the Constitution demands such an accommodation [in the absence of an emergency]"); *Cookish v. Powell*, 945 F.2d 441, 447 (1st Cir. 1991) (per curiam) (visual observation of a nude male by a female corrections officer "would (in all likelihood) violate the Fourth Amendment, *except* in an emergency condition"); *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) ("We think that by instructing female guards to exclude the genital area on male inmates in conducting a frisk, defendants have afforded plaintiff whatever privacy right he may be entitled to in this context.").

In other such cases, courts have found that the searches were reasonable. *Timm v. Gunter*, 917 F.2d 1093, 1100-01 (8th Cir. 1990) (concluding district court "erred in requiring prison administrators to accommodate inmates' rights to be free from opposite-sex pat searches" where "female officers also stated that they have never intentionally touched an inmate's genital or anal areas"); *Michenfelder v. Sumner*, 860 F.2d 328, 338 (9th Cir. 1988) ("the routine strip search procedures at the Nevada State Prison, even when conducted outside the inmates' cells by officers carrying taser guns and where female employees might occasionally view them, did not violate Michenfelder's fourth and eighth amendment rights"); *Grummett v. Rushen*, 779 F.2d 491, 496 (9th

Cir. 1985) (where "female guards do not routinely conduct or observe strip or body cavity searches . . . [but] on two or three occasions, in emergency situations . . . female guards observed strip searches[,] . . . the interest in prison security justifies such observations in emergency situations"); *Madyun v. Franzen*, 704 F.2d 954, 957 (7th Cir. 1983) (a "simple frisk or pat-down, done outside the clothing, without any deliberate attempt to examine the 'genital-anal' areas . . . would not have intruded unreasonably on Madyun's First Amendment privacy rights or his Fourth Amendment rights").[7] Divergent Fourth Amendment outcomes such as these are the inevitable result of an analysis designed to accommodate the myriad of facts and circumstances presented by searches carried out by government personnel. *See Florida v. Royer*, 460 U.S. 491, 506 (1983) (disavowing any "litmus-paper test" or single "sentence or . . . paragraph . . . rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth Amendment).

The specific and unique facts and circumstances of this case illustrate the fallacy in petitioners' claims of a circuit split. The search of Mr. Byrd in this case included the following elements:

- a team of officers leveled taser and pepper guns at Mr. Byrd;
- he was ordered to strip down to nothing more than his thin, pink underwear with a front slit lacking a closure;

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[7] This Court has denied certiorari in a number of these cases. *See, e.g., Timm v. Gunter*, 501 U.S. 1209 (1991); *Madyun v. Franzen*, 464 U.S. 996 (1983); *Smith v. Fairman*, 461 U.S. 907 (1983).

- numerous male officers were available to conduct the search;
- a female, O'Connell, conducted the search on the male prisoner;
- O'Connell was not a corrections officer and wore jeans and a t-shirt;
- the search took place in full view of ten to fifteen officers, twenty-five to thirty cadets in street clothes, and four to six inmates;
- the search was videotaped;
- Mr. Byrd was ordered to spread his feet and raise his arms above his head;
- O'Connell pulled out the waistband of Mr. Byrd's underwear three to four inches;
- she touched his outer and inner thigh to where it meets the groin through the underwear;
- she moved Mr. Byrd's penis and scrotum twice with her hand and applied pressure to his groin; and
- she spread the cheeks of his buttocks and ran her hand through the crack to search for contraband in his anus.

Byrd, 629 F.3d at 1136-37, 1142; Pet. App. 2a-4a & 14a-15a. These particular facts and circumstances were simply not present in any of the cases cited by petitioners in support of their claim of inter-circuit conflict. Petitioners circuit-split contentions minimize the distinctive facts of this case in an effort to force this case into one broad category – "pat searches" – and exclude it from another – "strip searches." But petitioners paint with too broad a brush. The facts of this case resist such "mechanical"

simplistic categorizations, as does this Court's Fourth Amendment jurisprudence. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"). The court of appeals expressly acknowledged the narrow, fact-specific nature of its holding, concluding only "that the cross-gender strip search performed on Byrd was unreasonable as a matter of law under the facts of this case and violated Byrd's rights under the *Fourth Amendment* to be free from unreasonable searches." *Byrd*, 629 F.3d at 1147 (emphasis added); Pet. App. 25a.

This court's holding below also defies petitioners' attempt to reduce the reasonableness of the search to a single factor. Contrary to petitioners' suggestion, the court did not condition the constitutionality of the search solely on the thinness of the clothing worn by Mr. Byrd. Instead, the court carefully considered the totality of the circumstances of the search, including the precise manner in which Mr. Byrd's body was touched, *Byrd*, 629 F.3d at 1142; Pet. App. 14a; the opposite gender status of the person who did the touching, *Byrd*, 629 F.3d at 1142-43; Pet. App. 14a-15a; the thinness of material through which Mr. Byrd's penis, scrotum and anus were touched, *Byrd*, 629 F.3d at 1142; Pet. App. 14a; the latex gloves worn by the searcher, *Byrd*, 629 F.3d at 1142; Pet. App. 14a; the lack of an official identification of the searcher, *Byrd*, 629 F.3d at 1143, 1147; Pet. App. 15a & 24a; the presence of several non-participating officers, *Byrd*, 629 F.3d at 1143; Pet. App. 15a; the videotaping of the search, *Byrd*, 629 F.3d at 1143, 1147 n. 10; Pet. App. 16a & 24a; and the lack of an emergency situation, *Byrd*, 629 F.3d at 1143; Pet.

App. 16a. It was the constellation of all of the particular facts in this case, and not a single fact, that led the court to conclude that this particular search was not reasonable. *Byrd*, 629 F.3d at 1147; Pet. App. 24a. Just so, the particular combination of facts in other cases led other courts of appeals to reach varying reasonableness conclusions. Petitioners' claim of a conflict among the circuits thus rings hollow.

Lacking a genuine circuit split, the petition is reduced to an invitation for this Court to re-review the evidence in this case and rehash the specific facts of this case – something this Court does not do on certiorari review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). And while the Fourth Amendment rights of an individual always present an "important federal question," petitioners fail to and cite not a single decision of this Court with which the court of appeals' decision conflicts. Sup. Ct. R. 10(c). Petitioners' suggestion that the law of bodily searches is now unsettled and requires a specific ruling by this Court to govern the precise circumstances of this case ignores this Court's acknowledgement that "precise definition[s]" and "mechanical application[s]," *Bell*, 441 U.S. at 559, are elusive in the Fourth Amendment context due to the "endless variations in the facts and circumstances." *Royer*, 460 U.S. at 506-07; *see also Robinette*, 519 U.S. at 39 ("we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"). Despite petitioners' protestations, the law in this area is quite settled.

Furthermore, petitioners' assertion that the decision below "wreaks havoc on the ability of female law enforcement officers to do their job" finds no sup-

port in the record here and cannot be credited. Pet. 14. The suggestion that Arizona jails lack a sufficient number of male staff to perform the kinds of searches at issue in this case is belied by the facts of the non-emergency search here, in which several male officers were available to perform the search. *Byrd*, 629 F.3d at 1136, 1143, 1147; Pet. App. 15a-16a & 24a.[8] And petitioners' insistence that a reasonableness standard will leave correctional officers without guidance cannot be squared with this Court's conclusion that a reasonableness standard provides adequate guidance in many law enforcement circumstances. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 397 (1989) (for Fourth Amendment purposes, the reasonableness of an officer's belief must be assessed in the particular circumstances confronting the officer at the time). No havoc will be wrought by holding correctional officers to a reasonableness standard.

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[8] Petitioners' concern that the court of appeals' decision will "relegate" female officers to "back office administrative tasks" has no support in the record (in fact, the search was performed by a cadet, not a officer), and at any rate, cannot shield the search that took place here from constitutional scrutiny.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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May 2, 2011

APPENDIX

UNITED STATES DISTRICT COURT

August 14, 2007
Jury Trial, Day 1

Testimony of Charles Byrd

***

[114]

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Q. Why were you in jail?
A. I got pulled over on a traffic stop and I gave my driver's -- my brother's driver's license to the officer and I was charged with identity theft.
Q. Why did you give your brother's driver's license to the officer?
A. Because my license was suspended.
Q. So is there any other basis for you being charged for identity theft?
A. That was it.
Q. Of what were you convicted in 2004?
A. I was convicted of identity theft.
[115] Q. So you heard Ms. Brandon avow a minute ago that you were convicted of forgery. Is that incorrect, in 2004?
A. That is incorrect.
Q. Okay. And was your charge held before a jury?
A. No.
Q. Did you plead?
A. Yes, I did plead.
Q. What did you plead?
A. I pled guilty.
Q. Why did you plead guilty?

A. Because I did it, I wanted to be responsible for my actions, and I didn't want to waste the Court system's time.

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[119]

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Q. Okay. Now, getting to the search, what happened immediately preceding the search?
A. I was in my room right here, I was in this first room right here by the door. I was laying down reading my book.
Q. And what happened immediately afterwards?
A. Okay. I hear all this banging on the door and all of a sudden all these SRT, Maricopa County SRT otherwise known as special response team -- they come in and start banging on the door, yelling, "Shut the fuck up, get down, lay down, get on the ground." Got their pepper ball guns and tasers pointed at you.
Q. And what did you do?
A. I laid down.
Q. Then what happened immediately after that?
A. Immediately after that, after everyone is laid down, they -- what they did was they would call two to four inmates at a time to strip down to their boxer shorts. They ordered them to take off their socks, their shoes, their shirts and their pants, come over here and line up by this door right here. And after they got two to four inmates, they would send them out like this into a line, [120] and then they would get like three or four lines like that lined up with the inmates.
Q. Okay. So they ordered you to strip down to your boxers. What did you believe would happen if you refused?

A. Well, I have seen what happens to the inmates who didn't comply with their orders. They pullout their batons, their mace, their tasers on them.
Q. Okay. So please describe what underwear you were wearing when they had you strip down.
A. It was a small pair of pink, pink underwear similar to those right there with the front open.
Q. And let the record show that the witness pointed at the black mannequin wearing pink boxers in the courtroom.
THE COURT: The record will so reflect.
Q. So after you were stripped down to your underwear, then what happened? What happened immediately afterward?
A. Then we were ordered to come out this door right here and get in these lines. And as I'm coming out, there's a bunch of civilians standing over here and a bunch of officers standing over here with them.
Q. When you say "civilians," what do you mean?
A. I mean people in clothes like -- like you wearing out on the streets, your blue jeans, T-shirt.
Q. And when you say "officers," what do you mean by that?
[121] A. Detention officers with uniforms similar to Ms. O'Connell's.
Q. How many females and how many males did you notice?
A. I couldn't give an exact number but I would say somewhere approximately between 20, 25.
Q. Of females or --
A. Of combined.
Q. Oh, combined. And of that combined number, how many were female?
A. I would say approximately one third of them.

Q. Okay. Did at this point, when you are walking out in your boxers in front of the civilians, did anyone tell you what was going on?
A. No. The only thing they told us was, "Shut the fuck up," pointing their taser guns and pepper ball guns at us.
Q. Okay. You testified a minute ago that they had you line up; correct?
A. Yes.
Q. And where I see six lines on the screen, how many could you please describe that process a little bit?
A. Okay. When they ordered us to come out -- I will just make these lines into one, try to, it's not working. Is that better?
Q. So let the record show that the witness is showing that there were three lines; correct?
[122] A. Right. To the best of my knowledge, there were three lines of inmates on each -- each row.
Q. Okay. And then what happened immediately afterwards?
A. Well, as I come -- I'm down here, right here, okay. There's one other guy here. I'm second to the last. Next thing I got this female behind me, walk up behind me. Well, excuse me, let me back up.
We got SRT guys in front of us, special response team, still screaming at us with their taser guns and their pepper ball guns, Shut the fuck up, look forward, don't ask no questions, be quiet, and they tell us to raise our arms and spread our legs, so we do. Then I got a female coming up behind me in civilian clothes wearing these white latex gloves.
Q. Did you see the person behind you?
A. Yes, I did.
Q. Is that person in the courtroom today?

A. Yeah. She's right there at the Maricopa County sheriff's detention, officer uniform on.
MR. BROWER: Let the record show that Mr. Byrd indicated Ms. O'Connell was that person.
THE COURT: The record will so reflect.
BY MR. BROWER:
Q. So what happened at this time? Did anyone tell you what was going on at that time?
[123] A. No.
Q. And you just testified that you saw a female civilian come up behind you; correct?
A. Yes. That is correct.

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[124]

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Q. Okay. So what happened immediately after she was searching your torso?
A. Is it okay if I stand up?
THE COURT: Just follow the directions from your lawyer. Would you like him to stand up to demonstrate?
That's fine.
MR. BROWER: If Your. Honor permits, yes.
THE COURT: Yes, you may.
THE WITNESS: After she finishes my torso, my stomach, she grabs my waistband of my underwear, pulls it out like this all the way around.
BY MR. BROWER:
Q. So the record is clear, about how far away from your body did she pullout your boxers?
A. I'd say about three or four inches.
Q. Three or four inches?
A. Yeah.
Q. And she's standing behind you at the time?

A. Yes.
Q. Did she visibly inspect your naked buttocks when she opened up your boxers in this manner?
A. That I cannot -- I do not know because we were ordered to look straight ahead. We got taser guns and paint -- pepper ball guns pointed at us.

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[136]

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Q. When did you find out she was a cadet?
A. After all this happened and we were ordered to go back in our pod, the next shift came on and I asked them who were those people, they said they were officers in training, cadet officers.
Q. What did you do immediately after this incident?
A. I asked for a grievance form and I filed a grievance immediately.

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[137]

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Q. A moment ago you heard Ms. Brandon avow that these searches are done to find contraband. Have you ever had contraband?
A. Never.
Q. Have you ever posted a security threat to the Maricopa Sheriff's Office?
A. Never.
Q. What makes you say that?
[138] A. Because I have had no writeups -- they are called tickets -- in jail. But I have had no writeups, no disciplinary action, nothing.
Q. So you have never been sanctioned for contraband?
A. No.

Q. Have you ever being sanctioned for being a dangerous -- or a danger?
A. I have never been sanctioned for anything.

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[139]

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Q. You spoke a minute ago about your childhood and I want to touch briefly on that.
You mentioned something about being abused. Were you mentioning physical abuse by your stepmother?
A. It was by my step-aunt -- or yeah. Physical abuse by my stepmother, yeah.
Q. How old were you -- when that happened?
A. It started when I was seven.
Q. And what are we talking about? What type of physical abuse?
A. From the time I was seven to ten, any time we did anything wrong she would come over, pinch us and leave big old welts on us. And when my stepfather -- I was raised by two stepparents. Or when my stepfather got home, she would tell him a load of bullshit and he would beat us.
Q. Okay.
A. CPS was called three times over it, but because it was [140] a little small town of Oracle in Pinal County, my stepdad was friends with all the judges and the police department, nothing ever came of it.
Q. Did she ever make you strip down --
A. Yes.
Q. -- as part of the discipline?
A. Well, when we were fixing to get beat she made us strip down to our underwear.
Q. You mentioned your step-aunt. Is that a different incident of abuse?

A. Yeah.
Q. What happened there? What abuse was this?
A. When I was 14 she started messing around with me. And I was brought up in a real religious background. And after she started messing around with me and she knew the situation I had with my stepparents, getting beat all the time, she would tell me, "Don't say anything." What happened, I ended up turning around being her little boy toy from the ages of 14 to 16.
Q. Mr. Byrd, you are going to have to explain that.
A. All right. She used to have me perform -- starting when I was fourteen, perform oral sex on her, she would perform it on me. We would have intercourse, and she told me if anybody found out, that I know what would happen to me, that I would get beat again.
[141] Q. Did she ever make you strip down?
A. Yes.

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[141]

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Q. If we could briefly go back to the aftermath, after the search -- actually talk about the search one more moment. Were you videotaped?
A. Yes, we were.
Q. Who videotaped you?
A. There was some officers over here by D pod, where all the civilians were and the other officers where I showed you earlier in the diagram standing there with handheld video cameras. I don't know who personally, but there were officers over there with handheld video cameras taping.

Q. Did they explain to you why they were videotaping you?
A. No. The only thing that they -- only thing that we were told, that any of them said was, "Shut the fuck up, keep your eyes forward."

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[144]

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Q. Mr. Byrd, you indicated that you thought you saw several people with a hand -- holding cameras at the time of the search on October 28, 2004. How many people were there that you saw with a handheld camera?
A. I seen at least two people holding cameras.
Q. And how were they dressed?
A. One was an officer, one was in civilian clothes like on the streets.
Q. What kind of cameras did they have?
A. Little handheld ones. I don't know what brand they were, what model. All I know is they are small enough to hold in your hand.
Q. And where was the camera relative to you?
A. It was over here to my right where these officers were standing.
Q. How close is that to you?
A. I would say approximately 30 feet, 25, 30 feet.

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[156]

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Q. Now, how long would you say this search with -- by Kathleen O'Connell took?
A. How long did it take? I would say roughly about 60 seconds.

UNITED STATES DISTRICT COURT

August 14, 2007
Jury Trial, Day 1

Testimony of Kathleen O'Connell

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[175]

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Q. Explain to me how you can't do an effective practice search on a mannequin versus a live body.
A. Because with the male anatomy, how the scrotum hangs below it sticks to the sides of the legs, it may stick up against the perineum, and inmates are known to tape, place, or hide items on their inner thighs, in their groins, or on their perineum. On a mannequin like that, they don't have testicles. There is nothing I need to [176] move.
Q. Exactly.
A. On a male inmate with a scrotum that does touch the inner leg or the perineum, the top of my hand through their clothes moves that out of the way to touch the inner thigh, to touch the groin, to touch the perineum.
Q. Makes perfect sense to me. Because of the male's anatomy you have to get underneath the scrotum to properly search that individual, don't you?
A. With the --
Q. You have to get --
A. -- with the flat top part of my hand, yes, sir, not the cupping motion.

Q. So you have to get underneath the scrotum area and perineum area to make sure there's nothing taped in there.
A. Yes.
Q. And you can't do that on a mannequin; right? You can't do that on a mannequin?
A. You can't move his scrotum, no, sir.
Q. But on an inmate like Mr. Byrd, you can get underneath there with your hand, check the scrotum and testicle area; yes?
A. Yes.

***

[177]

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Q. A male has scrotum and testicles. You are searching underneath the testicles and scrotum to make sure there is nothing taped underneath there; right?
A. Correct.
Q. Another fold area of the male anatomy is the penis; correct?
[178] A. Yes.
Q. Again, if you are searching all the different folds of the male anatomy, wouldn't one of those fold areas be the penis?
A. It may be the penis, sir, but I have not been trained nor since I have been trained have I searched an inmate's penis. I have searched the inner thigh, the groin and the perineum, moving the genitalia and the scrotum out of the way with the top of my hand under -- with his clothes on. So when I move his scrotum out of the way, moving it from his leg, it's with the top of my hand and I'm pushing it away. I'm not cupping it, I'm not grabbing it, and I'm not lifting it up to look underneath it.

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[189]

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Q. How many cadets were -- I'm sorry. How many cadets were with you at the time in which you arrived at the Durango jail?
A. Twenty-five, thirty.
Q. Of those 25 to 30, how many of them were male cadets?
A. About two-thirds of them.
Q. In addition to the cadets, how many law enforcement or sheriff detention officers were present in the Durango jail at the time? Do your best approximation.
A. Male, or male and female?
Q. Just in total; total number. I don't care about male, female. Just give me total number?
A. Probably 10, 15.
Q. Out of the 10 or 15, approximately how many of them [190] were female detention officers?
A. About a third of them.
Q. When you – so you were brought to the Durango jail.
A. Uh-huh.
Q. You were then told that you were going to search this particular pod; yes?
A. Yes.
Q. Were you given any additional instructions?
A. They told us to go in and wait. SRT would go in, bring them out in their boxers, bring them out in a line, and strip search them – or pat search them, I apologize, pat search them. Once we were done pat searching them, they would go to the opposite end of the multiroom or day room and sit Indian style.

Q. So as I understand the events, SRT would go in there and clear the pods and bring them out to the day room; yes?
A. Yes.
Q. And your academy class at the time was sitting in the corner of the day room waiting for the SRT officers to bring them into the area; yes?
A. We were sitting in the middle of the day room; yes.
Q. You were sitting in the middle of the day room. You were wearing blue jeans?
A. Right.
[191] Q. You were wearing white T-shirts?
A. Yes.
Q. Were you wearing badges?
A. No.
Q. Were you wearing hats?
A. No.
Q. Were you wearing anything at all that identified you as a Maricopa County sheriff officer?
A. No.

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[193]

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Q. As the cadets are waiting to search them behind them, did anyone ever tell them these are cadet detention officers?
A. I don't know, sir.
Q. You don't know.
A. I don't know if SRT had told them. I, however, did not tell them.

***

Q. Okay. So someone walking in this day area, seeing individuals in blue jeans and a white T-shirt, could

very well believe that they were just citizens like you and I in a jail house.
A. They could have.
Q. Now, as they are being marched out, all they are in is underwear.
[194] A. Correct.
Q. Famous Sheriff Joe pink underwear that we have on the mannequin.
A. Absolutely.

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[196]

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Q. Now, this male -- this underwear that these cadets are wearing, they have an opening. They are traditional boxer shorts; right?
A. Yes, they do.
Q. They've an opening like you and I see every single day.
A. Yes.
Q. And you agree with me that it's possible that when a male is walking and being marched out in these boxer shorts with an opening, that their penis or scrotum or testicles be exposed in that process.
A. It could be, yes.
Q. And you would agree with me that it would be very humiliating if someone's penis or scrotum was showing to strangers that they have never met before.
A. Yes.
Q. Let alone female.
A. Yes.
Q. Let alone someone they believe they are just civilians [197] in the jail house.
A. Yes.

***

[217]

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Q. Did you pullout his waistband?
A. I pulled it out a couple of inches; yes.
Q. So you do pullout the waistband front and back.
A. Start at the back, pat searched around so I can peel it out so my fingers and hands are not rubbing his skin. I pull it out so I can feel it around to make sure that nothing is taped or placed or hidden in the waistband of [218] his boxer shorts.
Q. So you want to make sure you are pulling out the waistband as far as enough as you possibly can to make sure are you not making any skin-to-skin contact with your hand?
A. No. I'm not pulling it as far as I possibly can. I'm pulling out a few inches so my hands are not touching his body.
Q. If you make skin-to-skin contact in the course of searching that waistband, that would be inappropriate; yes?
A. I was wearing gloves at the time. If my fingers touch his waist, it's all right because I'm just pulling it out enough to where I'm not rubbing it. I never rub the waistband; I'm feeling.
Q. So your testimony is you pullout the waistband, you search the waistband, and if your hands accidently touch his waist, that's okay.
A. Yes.
Q. You would agree with me that it can be humiliating having someone of the opposite sex run their hands along the waistband of your undergarments; right?
A. It could be.

Q. You would agree that it very well could be humiliating having someone of the opposite sex touch you in that
[219] region.
A. It could be.
Q. Intentionally or unintentionally.
A. It could be.
Q. We're talking again a very intimate place on the body, aren't we?
A. The waist?
Q. The waist.
A. Okay.
Q. Right?
A. Yes.
Q. And we're talking about the waist, let's make no bones about it, we're talking about the buttocks area, the waist, the genitals of a male or female around the waist --
A. Yes.
Q. -- and it can be very uncomfortable to have someone of the opposite sex touch you in that area; right?
A. Yes.
Q. Especially a stranger; right?
A. Yes.
Q. Especially not knowing what's going on; right?
A. Yes.
Q. Especially not being told what's going on; right?
A. Yes.
[220] Q. Especially if it's just during the course of a training exercise.
A. It wasn't during the course of a training exercise.
Q. Okay. Did you look inside his boxer shorts when you pulled it out?
A. No, sir; I did not.
Q. If you would have, that would have been improper.

A. Yes.
Q. Can't look at the opposite sex anatomy; yes?
A. Correct.
Q. Pull the waistband out, finger may accidently touch the waist, okay, fine, done. Then you go to the inner thigh; yes?
A. No.
Q. No. Where do you go next?
A. Go to the outer thigh.
Q. One hand on the outer thigh?
A. Yes.
Q. Outer thigh being the upper buttocks and buttocks region?
A. The hip, yes.
Q. The hip. Where does the second hand go?
A. It stays on his lower back, it holds on -- it to the back part of his boxer shorts on his lower back.
Q. Okay. So then you search the outer thigh?
[221] A. Yes.
Q. To the point in which the boxer shorts stop.
A. Yes.
Q. You don't go -- you don't touch skin.
A. No.
Q. You touch skin it's inappropriate or wrong.
A. Correct.
Q. However, there are circumstances when you do that search that you touch an inmate's skin.
A. The lower parts of his back, his waist, my finger tips; yes.

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[222]

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Q. Where do you start that search at?

A. Where the boxer shorts end, so when I stop on the outer side, slide it around to the inside, and up.
Q. Where the groin and leg connects?
A. Yes.
Q. The natural V area?
A. Yes.
Q. You are applying pressure in that area?
A. Slight pressure, yes.
Q. You move the scrotum, penis to the side to search the area?
A. Moving the scrotum out of the way, yes.
Q. Okay. I hate to be crass, unfortunately I'm a guy, but sometimes the penis can be on that side, the penis is out of the way, you are moving the penis out of the way as well.
A. It could be.
Q. You are moving that out because you want to apply pressure to make sure there's nothing taped to the [223] inside--
A. I want to feel to make sure there's nothing placed, taped, or hidden in the groin, the inner thigh, or the perineum. When you say "pressure," you are making it sound like I'm pushing as hard as I can.

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[223]

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Q. Famous Joe pink boxer shorts?
A. Yes, sir.
Q. They are loose.
A. Uh-huh.
Q. They are not tight, so are you not just lightly -- you got to get up there to make sure that that boxer short is against the skin; right?

A. I have to apply slight pressure to move the boxers up to feel the inner thigh, yes.
Q. Because you have this material.
A. It's very thin material, sir.

***

[226]

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Q. I'm sorry. You start bottom and you work your way up?
A. Yes.
Q. Oh. Okay. I apologize.
A. That way there is no accident, no grabbing of the genitals, your hand is already where it's supposed to be. You just slide it up to move the genitals away from the leg, feel, and then you are done, Take your hand out, you [227] are done, switch sides.
Q. After you do the other side of the inner thigh, where do you go next?
A. Then I take my hand to the bottom of his buttocks cheeks where they start, and I run it up to separate it to make sure that nothing is taped, placed, or hidden on the insides of the buttocks.
Q. And again, you are applying pressure as you are running up.
A. Yes.
Q. And again, because you want to make sure that there's nothing taped underneath there.
A. Yes.
Q. And again, you have the loose boxer shorts hanging and you make sure you are applying enough pressure so you can make sure you are feeling -- getting a good feel of that area as you are moving up?
A. Slight pressure to get my fingers between the cracks of his buttocks to go up.

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[237]
BY MS. BRANDON:
Q. First, before you begin, were you wearing gloves?
A. Yes, I was.
Q. Do you have the gloves with you?
A. I have blue ones, not white latex gloves.
Q. Could you put your gloves on?
A. Yes.
Q. Are you telling me that on that occasion the gloves were white?
A. Yes. White latex gloves.

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[238]

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Q. Could you estimate -- it seemed to me that was [239] somewhere around 10, 15, 20 seconds. Would you say that was about how long it takes to do?
A. Yes.

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UNITED STATES DISTRICT COURT

August 15, 2007
Jury Trial, Day 2

Testimony of Kathleen O'Connell

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[335]

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Q. Officer O'Connell, at the time you performed the search, did you -- do you recall -- let me backtrack. Do you recall where you were standing at the time you performed your first search on October 28th, 2004 on an inmate?
A. I know that I was standing in the middle of the multipurpose room and I was standing in the middle of our class. I wasn't off to one side.
[336] Q. Forgive my awkward-drawing here. Thank you, Captain Peterson. What I meant to draw was a large rectangle signifying the multipurpose room or day room at Durango. And I drew a row of Xs and then a second row of Xs and then a third row of Xs. And I put five Xs in a row, and those Xs were my feeble attempt at trying to identify cadets. Is that approximately the way you were lined up in the multipurpose room before the search began?
A. Yes.
Q. Did they ask you all to line up?
A. Yes.
Q. Do you know how many Xs there were?
A. Roughly eight or nine wide, maybe four or five deep.

Q. So I'm adding Xs there. And you are saying there was maybe -- and these cadets were both male and female?
A. Yes.
Q. Were they mostly male?
A. Yeah.
Q. Were you only one or two females?
A. No. There was a couple of females.
Q. The circles here are meant to identify or designate inmates. And were the inmates lined up and brought in facing you?
A. They were lined up, walking out. They would have been --[337] the officers would have been to the right-hand side of the inmates. So they didn't walk out looking at us head-on, they were walking out with the officers to the right-hand side of them. When they would get in front of their designated officer then they would turn and have their backs facing the officer.
Q. Okay. So I don't know how I'm going to do faces here but they were facing this way?
A. Yes, when they were being searched.
Q. They walked in this way and then they turned, pivoted, and were facing this way.
A. Correct.
Q. And were there other people along this wall?
A. Yes.
Q. And who was there?
A. SRT, my academy training staff, and other officers.

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Q. Do you recall that day if there was any officer or anyone with a hand-held video cam?

A. Yes, ma'am.
Q. And was there?
A. Yes.
Q. And who was there?
A. I don't know his name but I do know that he was following our academy class from start to end and he was taking clips of what we had done through the academy, and then at the very end he made a video out of it. And like Mr. Lopez had stated earlier, it was like a yearbook for us. We could remember what [339] we had done and all the activities that we had learned and done.
Q. And he presented each one of you with one; is that correct?
A. Yes.
Q. Where, if you recall, was that man on October 28th, 2004?
A. I saw him a few times maybe around to the right-hand side but I never – I don't remember where he was the whole time.
Q. Do you have any information as to whether he took videos of the entire search that day?
A. No, I do not.

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UNITED STATES DISTRICT COURT

August 16, 2007
Jury Trial, Day 3

Jury Instructions

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First Unreasonable Search Claim

In this case, the plaintiff alleges the Defendant Kathleen O'Connell deprived him of his right against unreasonable search by intentionally squeezing or kneading his penis or scrotum or improperly touching his anus through his underwear. Plaintiff must prove any of those facts by a preponderance of evidence. If you find plaintiff has proved any of those facts, your verdict should be for plaintiff. If, on the other hand, the plaintiff has failed to make this proof, your verdict should be for the defendant.

Due Process of Law Claim

In this case, the plaintiff also alleges that Defendant O'Connell deprived him of due process of law. To prove this claim, plaintiff must prove each of the following elements by a preponderance of evidence:

1. Defendant O'Connell intentionally squeezed or kneaded his penis or scrotum or improperly touched his anus through his underwear.

2. Defendant's actions inflicted pain on the plaintiff; and

3. That infliction was wanton.

Sufficient evidence of pain may include showing that plaintiff experienced or would be likely to experience psychological pain, such as emotional distress, public humiliation, mental anguish, embarrassment or public shame.

If you find plaintiff has proved all those elements, your verdict should be for plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Second Unreasonable Search Claim

In this case, the plaintiff also alleges that Defendant O'Connell deprived him of his right against unreasonable search by conducting a search not done for identified security need. If plaintiff proves by a preponderance of evidence that Defendant O'Connell's search was not done for identified security need, your verdict should be for the plaintiff on this claim. If, on the other hand, plaintiff has failed to prove that fact, your verdict should be for Defendant O'Connell.

For this claim plaintiff need not prove that Defendant O'Connell knew that the search lacked identified security need.

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UNITED STATES DISTRICT COURT

August 16, 2007
Jury Trial, Day 3

Entry of Judgment

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THE COURT: The record will show the presence of counsel, the parties, and the jury. Members of the jury, have you reached a verdict?
Juror: Yes, we have.
THE COURT: And you may hand your verdict form to the clerk. The clerk will please read and record the verdict.
THE COURT DEPUTY: We, the jury, duly empanelled and sworn in the above-entitled action upon our oath do find, one on the first claim for unreasonable search, in favor of defendant O'Connell.
Two, on the due process of law claim, in favor of defendant O'Connell.
Three, on the second unreasonable search claim, in favor of defendant O'Connell.

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THE COURT: The Jury having returned its verdict and the Court having previously entered its orders on partial Summary Judgment and on Motions For Judgment as a matter of law, it is ordered that the clerk enter judgment in favor of all defendants and that plaintiff take nothing.

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UNITED STATES DISTRICT COURT

Affidavit of Lt. Scott Frye

Lt. Scott Frye, being first duly sworn upon his oath, deposes and states:

1. I have been employed with the Maricopa County Sheriff's Office (MSCO) since July 1976 and I am currently the Executive Officer of the Durango Jail.

2. I am informed and believe that on October 28, 2004, MCSO Academy Class #813 and MCSO SRT (Special Response Team) performed pat searches and cell searches in the Durango Jail, Housing Unit 4, and one of the inmates searched was Mr. Charles Byrd, the plaintiff in a lawsuit filed in Federal District Court, Charles Edward Byrd v. Joseph Arpaio, et al, CV04-2701-PHX NVW. I am informed and believe that the pat search performed by Officer Kathleen O'Connell on Mr. Byrd is the subject of this lawsuit.

3. It is our custom and practice to perform regular mass pat searches and cell searches in Durango Jail for security purposes. This is done at present and was done in October 2004 and at the relevant time for this lawsuit, October 28, 2004. Pat searches and cell searches are always together and routinely performed for security purposes about four times a month. They are performed when there is sufficient staff available to search the inmates in the Day Rooms and to search the Pod and all the cells. Sufficient staff includes MCSO Academy students.

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UNITED STATES DISTRICT COURT

Pro se Motion to Dismiss Defendant(s) Motion for Summary Judgment[1]

Charles Edward Byrd

Come now the Plaintiff, Charles Edward Byrd respectfully asking of this Court to dismiss the defendant(s) Motion for summary judgment based on the following statements.

Six months after the Plaintiff filed his first grievance on October 28, 2004 (Exibit A), and his second grievance, (Exibit B) and his third grievance (Exibit C) and his fourth grievance (Exibit D), The defendant's refused to take any action, so the Plaintiff wrote the Phoenix Police Department to file criminal charges on Officer O'Connell. The Phoenix Police Department sent the letter to Maricopa County Sheriff's Office. Then The Maricopa County Sheriff's Office sent the Plaintiff a letter dated April 29, 2005 in which the letter denied knowing this happened to the Plaintiff (Exibit E). The Plaintiff(s) Constitutional Right's were clearly violated, see (Exibit F) 607 P.2d 206, 44 Or. App. 755, *Sterling v. Cupp*, (Or. App. 1980) 206 607 P.2d 206 44 Or. App. 755, 22 Empl. Prac. Dec. P. 30,797 clearly states "Except in emergency situations, frisking or body searching of clothed male inmates by female correction officers, which involved some touching of genital and anal areas

[1] Handwritten in original.

through clothing, violates inmates' constitutional right to privacy.

Civil Rights Act of 1964, § 701 et. seq., 42 U.S.C.A. § 2000e et. seq., clearly states, male prisoners' constitutional right to privacy prevails over consequent limitations on employment opportunities for women. Individuals officials face liability under § 1983 when they commit constitutional tort or are personally involved in alleged unconstitutional act. 42 U.S.C.A. § 1983. Plaintiff in § 1983 civil rights action can recover monetary damages, including punitive damages against officials who are named in their official capacity. 42 U.S.C.A. § 1983.

A cause of action to recover damages is a "fundamental right" guaranteed by the Arizona Constitution A.R.S. Const. Art. 18, § 6.

A governmental entity is liable under § 1983 when injury is inflicted by execution of that entity's policy, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, 42 U.S.C.A. § 1983, *Flanders v. Maricopa County*, 54 P.3d 837, 203 Ariz. 368. Plaintiff may seek compensatory damages for the denial of his constitutional rights. *See Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1989) (providing that a § 1983 victim is "entitled to recover compensatory damages for all injuries suffered as a consequence of those deprivations.") The Plaintiff has shown the existence of a "genuine" issue of material facts, and the Plaintiff has established that a reasonable jury could return a verdict in his favor. (*Anderson v. Liberty*

Lobby, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986).

Plaintiff seeks and is entitled to seek compensatory and punitive damages for the denial of his Constitutional Rights.

Wherefore, the Plaintiff respectfully ask of this Court to dismiss the defendant(s) Motion for summary judgment and allow this case to proceed to trial.

Respectfully submitted on this 31st day of January, 2007

Charles Edward Byrd

Exibit A: Grievance #14585 dated 10-28-2004
Exibit B: Grievance #15550 dated 12-9-2004
Exibit C: Grievance #15549 dated 12-19-2004
Exibit D: Grievance #15460 dated 12-19-2004
Exibit E: letter sent to Plaintiff from Maricopa County Sheriff's Office dated 4-29-2005
Exibit F: 607 P.2d 206, 44 Or. App. 755, Sterling v. Cupp (Or. App. 1980)